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No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, *Petitioner*

v.

CONSOLIDATED FOODS CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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October 6, 1964

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Trabon Engineering Corporation, The Frank D. Johnson Company and Wayne G. Ritter, d.b.a. Ritter Engineering Company (herein referred to collectively as "Trabon") have moved for leave to file a brief amicus curiae, submitted with the motion, in support of the petition for a writ of certiorari filed by the Solicitor General.

Consolidated Foods Corporation refused to consent to the filing of this brief and urges the Court to deny the motion. The reason is simple—there is no suggestion in the motion or the brief that the issues have not already been adequately presented to the Court; the motion and brief merely repeat some of the arguments already presented by the Solicitor General.

The Issues Here Are Purely Factual

We suggest that Trabon should be satisfied with this statement of the law by the Seventh Circuit to which neither party in this case has objected:

> "Undoubtedly there are situations resulting from acquisitions or mergers in which business reciprocity has the effect of substantially lessening competition or can be so utilized. Where the probability of such an effect arising out of a merger or acquisition is demonstrated the requirements for application of Section 7 are satisfied." (329 F. 2d 623, 626)

Trabon's problem is not with the law but with the facts. It is Trabon's burden to prove in the context of its industry (manufacture and distribution of industrial lubricating systems) that the merger it is attacking will give rise to a reciprocity power that can induce substantial sales of the products involved. This Court, we respectfully submit, is not the proper forum in which to seek resolution of Trabon's problems of proof.

Trabon, like the Solicitor General and the Federal Trade Commission before him, advocates a rule of law condemning mergers solely because they give rise to a reciprocity opportunity. The admitted basis for the proposal is the *assumption* that reciprocity is a sales-inducing device for every company in every industry. Assuming that there is no doubt about reciprocity effect, Trabon states that a conglomerate acquisition such as that involved here "creates a protected market" and establishes "a vehicle for the use of business coercion." (Trabon's Brief, pp. 2-4) Obviously, once these dire effects have been postulated in the market structure described by Trabon, it is easy to conclude that competition will be substantially lessened.

But it simply does not follow that, because reciprocity is sometimes practiced in the gamut of human relationships, it will always or even usually be effective in producing any sales—let alone substantial sales—for every business in every market. The nature of the products, the dependence of the seller on the buyer and vice versa, the extent that sales motivations control purchasing decisions, the importance of price, service and quality—these and many other factors can and do vary the effect of reciprocity.

The critical issue in this case is whether reciprocity is, in fact, a sales-inducing power of any consequence in the food industry. And the failure of Commission counsel to discharge his burden of proof on this issue does not create obstacles for any private treble damage litigant. Trabon is entirely free under the undisputed principle established by the Seventh Circuit to endeavor to prove that reciprocity can be effective in its markets.

Post-Acquisition Evidence Cannot Be Ignored In This Case

Trabon's complaint about the Seventh Circuit's reliance on post-acquisition evidence endeavors to raise an issue not before the Court in this case. The post-acquisition evidence here was directed not to the ultimate question of merger effect, but to the critical threshold issue—can reciprocity be effective in the food industry? It matters not that in some Section 7 cases the Commission and the courts may have to evaluate the future effectiveness of a market power before it is brought into actual existence by a merger. Here, because the case was not brought until long after the acquisition was made, the Commission had eight years of experience on which to base its decision as to reciprocity effect. To suggest, as Trabon does, that this evidence be disregarded merely because it may not always be available is to ask this Court to rule on a case not before it and, in

effect, to depart from the principles of *United States* v. *duPont*, 353 U.S. 586 (1957), where the Court considered post-acquisition evidence covering decades of experience on the fact issue of stock ownership as a sales-inducing power.

There are other reasons why this case is not a proper vehicle to consider Trabon's suggestion that all post-acquisition evidence be disregarded in a Section 7 case involving a conglomerate merger. Trabon argues that the rule is justified because conglomerates can suppress a newly acquired market power, thereby rendering post-acquisition evidence unreliable. (Trabon's Brief, p. 7) But here the alleged "power" was not suppressed—it was fully tested but produced no significant sales for Gentry. Not only was overt reciprocity unsuccessfully attempted, but the Commission relied on the existence of an alleged power which could not be suppressed—a "silent reciprocity power" which was theoretically effective whether exercised or not. There can be no basis, therefore, for arguing that it was improper for the Seventh Circuit to consider post-acquisition evidence in evaluating reciprocity effect in this case.

Conclusion

Trabon's arguments, predicated on the unwarranted assumption that reciprocity is always effective, ignore the crux of this case—that a reciprocity-creating merger, like any merger, must be assessed under Section 7 "in the context of its particular industry," to use the language of this Court in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 321 (1962). Only by ignoring the critical importance of evaluating reciprocity effect in marketplace context is Trabon able to avoid the obvious—that this case presents only issues of fact.

The motion should be denied because Trabon misconceives the real issues and offers nothing new by way of theory or argument.

Respectfully submitted,

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